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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 COBBLER NEVADA, LLC,

8 Plaintiff,

9 v.

10 KEVIN JAMES,

11 Defendant.

C15-1430 TSZ

MINUTE ORDER

12 The following Minute Order is made by direction of the Court, the Honorable
13 Thomas S. Zilly, United States District Judge:

14 (1) By Order entered October 3, 2017, docket no. 75, the Court denied
15 plaintiff's motion for default judgment as a discovery sanction and directed plaintiff to
16 show cause why its claims against defendant Kevin James should not be dismissed. In its
17 response, docket no. 76, plaintiff indicates that, on October 8 and 13, 2015, as well as on
18 November 16, 2015, its attorney conducted discovery in advance of the Rule 26(f)
19 conference held on July 8, 2016. Moreover, plaintiff's counsel has attempted to testify in
20 this matter concerning inconsistent statements allegedly made by Mr. James. See Lowe
21 Decl. at ¶¶ 3-4 & 6 (docket no. 77). Because plaintiff's lawyer may not serve as both a
22 witness and counsel of record in this action, see Wash. RPC 3.7; see also Local Civil
23 Rule 83.3(a)(2), and because plaintiff was precluded from seeking discovery prior to the
Rule 26(f) conference "from any source," see Fed. R. Civ. P. 26(d)(1), the Court has
disregarded plaintiff's attorney's recitations about his conversations with Mr. James. To
the extent plaintiff seeks reconsideration and renews its request for default judgment as a
discovery sanction, the Court DENIES such motion.

(2) Plaintiff contends that "it is highly improbable" that someone outside
Mr. James's home could have successfully used his unsecured wireless network
("Wi-Fi") to engage in the infringement at issue. See Pla.'s Resp. at 11 (docket no. 76).
Plaintiff, however, offers no expert report or testimony to support this view. If plaintiff
wishes to further pursue its claims against Mr. James, it must make an offer of proof

1 within twenty-eight (28) days of the date of this Minute Order. Such offer of proof shall
2 be supported by the declaration of an expert in the field, setting forth such expert's
3 qualifications, and shall address the following issues: (i) whether and, if so, how an
4 Internet Protocol ("IP") address can be either "spoofed" to or faked by a BitTorrent
5 tracker, and what is the likelihood (quantified if possible) that Mr. James's IP address
6 was a false positive; (ii) whether and, if so, the extent to which an unsecured Wi-Fi
7 connection can be used to share files via the BitTorrent protocol, and what is the
8 likelihood (quantified if possible) that Mr. James's allegedly unsecured Wi-Fi system was
9 accessed by someone from outside his home; and (iii) whether and, if so, how plaintiff
10 can prove that the material allegedly tracked to Mr. James's IP address was a "playable"
11 and actionable segment of the copyrighted work at issue. In the absence of a timely filed
12 offer of proof, plaintiff's claims against Mr. James will be dismissed with prejudice and
13 without costs, and this case will be closed.

14 (3) The Clerk is directed to send a copy of this Minute Order to all counsel of
15 record and to defendant Kevin James pro se at 906 South 262nd Place, Des Moines, WA
16 98198.

17 Dated this 3rd day of November, 2017.

18 William M. McCool
19 Clerk

20 s/Karen Dews
21 Deputy Clerk